



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 31, 2023

IN THE MATTER OF:

Appeal Board No. 626400

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 626398, 626399 and 626400, the employer appeals from the decisions of the Administrative Law Judge filed October 26, 2022, which overruled the initial determinations disqualifying the claimant from receiving benefits, effective September 10, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to September 10, 2020 cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of \$10,400.00 in benefits recoverable pursuant to Labor Law § 597 (4), Federal Pandemic Unemployment

Compensation benefits of \$10,800.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and Pandemic Emergency Unemployment Compensation benefits of \$9,600.00 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 12 effective days and charging a civil penalty of \$4,620.00 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked at a nursing home as a certified nursing assistant from September 1, 2015 through September 9, 2020. Since approximately 2018, the claimant also was a union delegate. The employer requires that staff be working during their work time, and that they not leave their assigned unit unless they are on break or have permission from their supervisor.

On her last day of work, the claimant took a patient to an appointment and also was assigned to work from 3:00 PM to 11:00 PM providing care inside the building. Around 3:30 PM, the claimant saw that the human resources director was in the building. The claimant had a union issue she wanted to discuss with her. The claimant left her unit to meet with the human resources director. The human resources director left the facility at 4:15 PM.

Around 5:00 PM, one of the claimant's patients was found on the floor of her room, having fallen. A head-to-toe review of the patient did not reveal any apparent injury. The claimant returned to the unit around 5:20 PM. The claimant was off the unit so long because she lost track of the time. When the claimant reported for work on September 10, the employer suspended her, and the employer sought to terminate the claimant's employment based on neglect and abandonment of a patient on September 9.

The claimant filed a claim for benefits on September 15, 2020. Instead of identifying the present employer as her most recent employer, the claimant reported that a previous employer was her most recent employer. The claimant received \$10,400.00 in regular unemployment benefits, \$10,800.00 in FPUC benefits, and \$9,600.00 in PEUC benefits.

An arbitration hearing was held at which the claimant was represented by an attorney and her union. The claimant testified at the arbitration hearing and contended she had permission to leave the unit. The arbitrator issued an opinion, with no separate findings of fact, that stated:

[Claimant] engaged in misconduct on September 9, 2020. Her actions that day of leaving the floor without permission, and being off the floor for an excessive period of time, were improper. They constituted misconduct warranting discipline.

The only question is the proper level of discipline...

The arbitrator ruled that the claimant should be reinstated, without back pay, subject to a final warning that would trigger her discharge in the event of any further proven serious misconduct.

OPINION: The credible evidence establishes that the claimant separated from employment on September 10, 2020 because she left her assigned unit without permission with the result that one of her patients fell and had to be picked up off the floor. Although the claimant contends she had permission to leave the unit, an arbitrator found, after a hearing at which the claimant was afforded due process, that the claimant did not have this permission. The arbitrator's finding is binding upon the Appeal Board (see *Matter of Ranni*, 58 NY2d 715 [1982]). We, in turn, must determine whether the claimant's actions constitute disqualifying misconduct for purposes of the Unemployment Insurance Law (see *Matter of Guimaraes*, 68 NY2d 989 [1986]). In making this determination, we note that the claimant was responsible for the care of vulnerable nursing home patients. Not only did she abandon her assigned unit without permission, but she remained away from her unit for more than an hour after the director of human resources left the building. During this prolonged absence, a resident in the claimant's care fell to the floor and had to be evaluated for potential injuries. At the hearing, the claimant acknowledged that she understood she was wrong to be away from the unit so long and that she could be

disciplined for it. Based on the serious risk of patient harm caused by the claimant's actions, we conclude that the claimant's actions constitute misconduct. Accordingly, we conclude that the claimant is disqualified from benefits.

The credible evidence further establishes that, when the claimant filed her claim for benefits, the claimant did not identify the current employer as her most recent employer. Instead, she named a past employer. The claimant subsequently received \$10,400.00 in regular unemployment benefits, \$10,800.00 in FPUC benefits, and \$9,600.00 in PEUC benefits. Because the claimant was disqualified from benefits, these amounts constitute an overpayment. The regular unemployment benefits are recoverable because the claimant made a factually false statement. The FPUC and PEUC benefits are recoverable pursuant to federal law. Accordingly, we further conclude that all of the overpaid benefits are recoverable.

The Administrative Law Judge determined in that the

claimant's misidentification of her most recent employer constituted a willful misrepresentation. As the claimant has not appealed from that decision, the Judge's conclusion is binding upon us. We further note that the claimant's misrepresentation resulted in an overpayment. Accordingly, we further conclude that the claimant is subject to a forfeiture penalty of 12 effective days and a civil penalty of \$4,620.00.

DECISION: The decisions of the Administrative Law Judge are reversed.

In Appeal Board Nos. 626398, 626399 and 626400, the initial determinations, disqualifying the claimant from receiving benefits, effective September 10, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to September 10, 2020 cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of \$10,400.00 in benefits recoverable pursuant to Labor Law §

597 (4), Federal Pandemic Unemployment Compensation benefits of \$10,800.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and Pandemic Emergency Unemployment Compensation benefits of \$9,600.00 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 12 effective days and charging a civil penalty of \$4,620.00 on the basis that the claimant made a willful misrepresentation to obtain benefits, are sustained.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER